Supreme Court, U.S.
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No. 00-889

In The

Supreme Court of the United States

CLYDE W. SMITH, JR.,

Petitioner,

v.

DONNA LEE WILLIAMS, Insurance Commissioner of the State of Delaware, as Receiver of National Heritage Life Insurance Company, a Company in Liquidation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

LISA SHEARER NELSON
Counsel of Record
THOMAS K. EQUELS
MARY KOGUT EQUELS
HOLTZMAN, KRINZMAN, EQUELS & FURIA, P.A.
542 East Park Avenue
Tallahassee, Florida 32301
(850) 222-2900
Attorneys for Respondent, Donna Lee Williams, Commissioner of Insurance for the State of Delaware

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OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities i

Statement of the Case 1

Argument Why the Writ Should Not be Granted ... 2

Conclusion 4

TABLE OF AUTHORITIES

CASES

Appalachian Power Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16 (1959) 3

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 3

Webster v. Offshore Food Service, Inc., 434 F. 2d 1191 (5th Cir. 1970) 4

STATEMENT OF THE CASE

Respondent makes the following clarifications to Petitioner's Statement of the Case.

Respondent characterizes himself as a CPA for Phoenix and National Heritage. In reality, he was an agent of Phoenix Trust and intricately involved in the financial transactions at the heart of this case. Smith was also a financial consultant for National Heritage and involved in National Heritage's financial affairs. (Petitioner's Appendix 2, page 3; Petitioner's Appendix 6, ¶¶ 10, 31). Smith's statement that he defended himself pro se is only partially true. Smith was represented by successive counsel until each counsel withdrew (R. Dkt. Nos. 132, 291, 544), and was represented by counsel when the original response to the Commissioner's Motion for Summary Judgment was filed. (Petitioner's Appendix 1, page 3n.1).

Respondent states that the United States District Court's order granting summary judgment against Smith identified paragraphs 30, 31 and 33 of the Expert Report and Declaration of Regan R. Rockhill (Appendix 6) as providing the basis of the summary judgment against Smith. (Petitioner's petition at 4.) However, the order points to Rockhill's declaration as an example of the evidence against Smith. The order states: "Accordingly, Plaintiff's evidence that Smith knowingly and intentionally participated in the theft at issue, *see, e.g., Dkt. 574* ¶¶ 31, 31 & 33, stands unrebutted by competent summary judgment evidence." (Petitioner's Appendix 1, page 3).

The Eleventh Circuit found that there was no evidence that the district court relied exclusively on Rockhill's declaration in granting summary judgment. The

Court noted that the evidence submitted in support of summary judgment included the declaration of Gail Kasmir, National Heritage's Chief Financial Officer, and the criminal plea agreements of Richard Plato and William J. Ford. Kasmir's declaration and the two plea agreements implicated Smith in the scheme to steal from National Heritage. (Petitioner's Appendix 2, page 3).

Petitioner also asserts that Rockwell stated "we may never know the true extent of his [Smith's] participation in the scheme to steal $16.6 million from NHL." He omits, however, that this lack of knowledge is based in part upon Smith's repeated invocation of the Fifth Amendment when questioned regarding his involvement with Phoenix and the distribution of funds stolen from National Heritage. Smith's reliance on the Fifth Amendment privilege in this civil case was also noted by the Eleventh Circuit in its decision affirming the trial court. (Petitioner's Appendix 2, page 4).

ARGUMENT WHY CERTIORARI SHOULD NOT BE GRANTED

Rule 10 of the Rules of the Supreme Court indicate the character of reasons that will be considered in granting or denying petitions for certiorari. Those reasons include a decision of a circuit court of appeals that conflicts with another circuit court of appeals on the same important matter; has decided an important federal question in a manner that conflicts with a decision of a court of last resort; or has so departed from the accepted and usual course of judicial proceedings that this Court's supervisory power is required. Rule 10(a), Rules of the

Supreme Court. "A petition for writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10.

This case presents none of the bases for review suggested in Rule 10. While the reasons cited in the rule are not exclusive, the Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

Petitioner does not assert that the decision in this case creates the sort of conflict confusion suggested in Rule 10. He simply states that the lower court erred. An application of the Rules of Civil Procedure by a district court that is affirmed by a Court of Appeals will not be reviewed by the Supreme Court where the question is one that concerns the judgment of the district court judge with respect to a particular set of facts. *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 18 (1959). That is precisely the situation presented to this Court.

The district court judge granted summary judgment based upon documents that showed Smith's extensive participation in a scheme to defraud National Heritage of millions of dollars: funds meant for the protection of the elderly and infirm. She noted Regan Rockhill's expert opinion as an example of the unrebutted evidence that

Smith had committed civil theft. The Eleventh Circuit affirmed the district court's judgment and held, consistent with *Webster v. Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970), that use of an expert witness in support of summary judgment is appropriate based upon the unequivocal, uncontradicted and unimpeached testimony of the expert witness, where the testimony bears on technical questions beyond the competence of law determination. The Court concluded that Rockhill's testimony met this criteria, but also noted that the expert testimony was not the only evidence upon which the district court relied. This case does not present the type of issue that requires this Court's review. Accordingly, Respondent urges this Court to deny certiorari.

CONCLUSION

Respondents pray that the Court deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

LISA SHEARER NELSON
THOMAS K. EQUELS
MARY KOGUT EQUELS
HOLTZMAN, KRINZMAN, EQUELS & FURIA, P.A.
542 East Park Avenue
Tallahassee, Florida 32301
Telephone (850) 222-2900
Facsimile (850) 222-2933

Attorneys for Respondent